United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

CORRECTED COPY

76-1564

To be argued by
PHYLIS SKLOOT BAMBERGER

B p/s

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

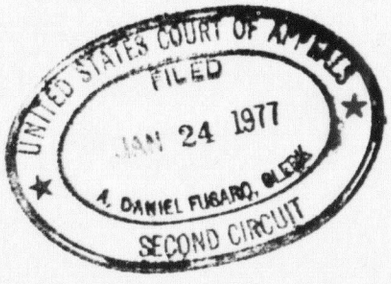
ROBERT JACKSON, WILLIAM SCOTT, and MARTIN ALLEN,

Defendants-Appellants.

Docket No. 76-1564
Docket No. 76-1565
Docket No. 76-1566

BRIEF FOR APPELLANT
ROBERT JACKSON

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT ROBERT JACKSON

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the trial judge erroneously concluded that the Government had established that appellant Jackson's conduct was an attempt.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jacob Mishler) rendered on November 23, 1976, convicting appellant Robert Jackson of conspiracy to commit armed bank robbery (18 U.S.C. §371); of two instances of attempted armed bank robbery, one on June 14, 1976, and the other on June 21, 1976; and of possession of unregistered sawed-off shotguns. Jackson was sentenced to two years' imprisonment for conspiracy and was given a suspended sentence with a three-year term of probation on each of the other counts, the terms of probation to run concurrently with each other and consecutively to the term of imprisonment.

Statement of Facts

The indictment* charged appellant Jackson, William Scott, and Martin Allen with conspiracy to rob a bank, attempts to do so on June 14 and 21, 1976, and with unlawful possession of firearms. Evidence about the events of June 14 was presented through the testimony of Vanessa Hodges, a co-conspirator and the planner of the activities.

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*The indictment is "B" to the separate joint appendix to appellants' briefs.

On June 11, 1976, Hodges (T.9*) was introduced to appellant Martin Allen (T.10). Hodges explained a plan for robbing a bank (T.10) which included arriving at the bank on Monday, June 14 (T.11) at 7:30 a.m. and entering the building with the bank manager in order to take the night deposit box (T.11). Allen agreed to participate. He was to pick up Hodges in a car on Monday morning, and he told Hodges that he had two sawed-off shotguns and a .38 revolver (T.12).

On Monday morning, Allen arrived to pick up Hodges in a car driven by appellant Jackson (T.13). The three of them drove off to the bank (T.15).

On arrival, they found that the bank was already open, and so went to get something to eat (T.15). After eating, Allen, appellant Jackson, and Hodges returned to the bank (T. 15, 44). In the car were sawed off shotguns and handcuffs (T. 16-17). Through a window, Hodges and Allen observed that the night deposits were in a box. They thought that what they had to do was to get the box and leave, but believed they needed additional manpower (T.42). Allen suggested that he had another friend to accompany them (T.16, 22, 61).

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*Numerals in parentheses preceded by "T" refer to pages of the transcript of the trial.

Appellant Jackson then put some cardboard in front of the license plate (T.22, 24), and they rode around for awhile (T.47). They removed the paper from the license plate and drove to Coney Island, where they found William Scott (T.24). who joined them (T.25). Allen also picked up another gun (T. 27).

The foursome drove back to the bank, and Allen entered to look around and determine where the cameras were located (T.27). After waiting, Scott entered the bank, and then concluded that it was too late and too busy at the bank to do the job (T.28). The four decided to wait until the following week.

They left the bank and returned to Coney Island (T.30).

Hodges, with Allen, then bought some gloves to hide fingerprints and a stocking to hide her face (T.31). Appellant Jackson left the group; the other three remained together for awhile before separating.

Hodges testified that she was arrested on June 18 and that her companions had learned about the arrest (T.34). She testified that Allen had told her they were not going to do the job on June 21 (T.34). On the other hand, Hodges, who had been cooperating with the agents from the time of her arrest, testified that she told the agents that she thought the others would go ahead with the plan (T.34).

Based on Hodges' information, FBI Agent Francis James Doyle coordinated a surveillance at the Manufacturers Hanover Trust Company branch at 210 Flushing Avenue in Brooklyn on

Monday, June 21. The surveillance team consisted of a truck with two agents (Henahan and Roach), another vehicle with three agents (Wichner, Garber, and Lagatol), a third vehicle with two agents (Mitchell and Sindall), and a fourth vehicle with two agents (Bernard and Dugan) that patrolled the area (H.26.*) All four vehicles were in radio contact with each other (H.27, 30).

Agents Doyle, Lagatol, Roach, and Wichner testified** about events on June 21.

At about 7:39, a four-door, medium brown Lincoln with a cardboard license plate on the rear and occupied by two black males in the front seat (H.30, 32; T.92) parked at Washington Place and Flushing Avenue (T.32) alongside the bank (T.77). Scott (T.78), a black male wearing a dungaree hat and getting out of the rear passenger side, walked to the corner (H.33). He got a cup of coffee (H.34), walked around the front of the bank and across the street (T.77), and re-entered the car (H. 34; T.77), which was driven away (H.34). The occupants of the car drove around the area (T.77). After driving around, the car was parked on the side of a parking lot furthest from the bank. The car remained parked for about five minutes and then

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*Numerals in parentheses preceded by "H" refer to pages of the transcript of the pretrial hearing.

**The testimony of Agents Doyle and Lagatol, given at the pretrial suppression hearing, was accepted, without consideration of the included hearsay, as their direct trial testimony (T.65-66).

moved east on Flushing Avenue toward Washington Place (H.36). Agent Doyle lost sight of the car (H.36); Agent Lagatol, with Agents Garber and Wichner, followed the car and saw it parked on Grand Avenue with its hood up and with appellant Jackson standing in front of it (H.63). The car returned to Flushing Avenue between Washington and Waverly without a license plate (H.37).

The car remained parked for an additional twenty minutes or so (H.38). The vehicle then moved east on Flushing Avenue, crossed Washington and Flushing (H.38), and the agents lost sight of it (H.39).

The surveillance agents then picked up the car again, at which time the men in the car became aware of the agents (H.65; T.92-93). In response to the sign of recognition, the agents stopped the car and arrested the three men (H.66). In the car was an open, zippered suitcase containing two loaded (T.83), sawed-off, slide or pump action shotguns, handcuffs, a toy revolver (H.66; T.82, 84), and, on the floor, a New York State license plate (H.67; T.99). One of the shotguns was operable (T.85, 95); the other was inoperable (T.95). The two firearms could not be and were not registered with the National Firearms Registration Transfer (T.87).

At the conclusion of the trial, all defense counsel requested entry of judgment of acquittal on Counts II and III, arguing that the Government had proved merely preparation for the bank robbery, and not attempt (T.102-107).

In an opinion dated September 22, 1976,* Judge Mishler found that the Government had proved an attempt on both dates and found all appellants guilty on all counts.

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*The opinion is "D" to the separate joint appendix to appellants' briefs.

ARGUMENT

THE JUDGE ERRONEOUSLY CONCLUDED THAT THE GOVERNMENT HAD ESTABLISHED THAT APPELLANT JACKSON'S CONDUCT WAS AN ATTEMPT.

In his opinion finding appellant Jackson guilty of two attempts to take money from the employees of a bank (Counts Two and Three), Judge Mishler, citing United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975), concluded that two elements had to be established: the intent requisite to commit the substantive crime and conduct constituting a substantial step toward commission of the crime corroborating the firmness of the criminal intent. He found that proof of conduct showing that a defendant neared completion of the crime was not required. Judge Mishler found that the conduct of appellants, as shown by this record, satisfied the two requirements.

In United States v. Stallworth, 543 F.2d 1038 (2d Cir. 1976), this Court adopted the two-pronged test which had been articulated one month earlier in the opinion of Judge Mishler in this case. However, the facts of Stallworth clearly show that the conduct of appellants here did not constitute a substantial step toward commission of the crime. The opinion in Stallworth describes the conduct of the defendants as follows:

> ... The undisputed testimony of Campbell and Young established that appellants intended to execute a successful bank robbery. More-

> over, Stallworth and Sellers, in furtherance of their plan, took substantial steps that strongly corroborated their criminal intent. They reconnoitered the bank, discussed (on tape) their plan of attack, armed themselves and stole ski masks and surgical gloves. The getaway car was carefully prepared for destruction. As Sellers moved ominously toward the bank and Campbell uttered a verbal signal to his accomplices, a bank robbery was in progress. A jury could properly find that preparation was long since completed. All that stood between appellants and success was a group of FBI agents and police officers.
>
> United States v. Stallworth, supra, 543 F.2d at 1041.

Here, the conduct on both June 14 and June 21 had not the qualities of a substantial step toward commission of the crime strongly corroborating the firmness of the criminal intent.*

Any analysis of attempt must focus on the language of the statute that is alleged to have been violated: whoever by force, violence, or intimidation attempts to take from the presence or person of another a thing of value which is in the area of a bank. As with any other crime, the mens rea and the illegal conduct must exist simultaneously.

A. June 14, 1976

On June 14, appellants arrived in their car at the bank location at 8:00 o'clock, a half-hour too late to execute the

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*Since appellant Jackson was merely the driver of the car, he could be guilty of the crime only as an aider and abetter.

plan of entering the bank with the manager to get the night deposits. They never got out of the car and they left the area of the bank to go get something to eat. This did not constitute an attempt because their conduct was not a substantial step in committing the crime until they arrived at the bank, at which time they did not have the intent to rob it.

From the time of their departure, they spent the rest of the day in preparation and revision of their plans. They checked the bank to see where the deposits had been put and to examine the layout of the bank. They went to Coney Island to pick up Scott, returned to the site of the bank, and decided not to enter because the bank was too crowded.

The conduct was not a substantial step to committing armed bank robbery because the acts were not sufficiently related in time or space to what would be the final series of acts necessary to complete the crime. The acts of getting the equipment after departing from the bank's vicinity and the entry into the bank to look it over were preparation for an intent that was conditional and future. These circumstances distinguish the conduct of appellants here, on the contiuum of preparation through attempt, from the conduct of the defendants in other cases discussing attempt.

In Stallworth, the defendants, charged with attempted bank robbery, had moved toward the bank uttering a verbal signal to accomplices and were arrested. In Mandujano, the de-

fendant, charged with attempted distribution of heroin, had been unable to locate his supplier for $650 worth of heroin. The $650 had been given to the defendant at his request for the purpose of buying the heroin. In United States v. Rumfelt, 445 F.2d 194 (7th Cir.), cert. denied, 404 U.S. 853 (1971), the defendant, charged with att mpt to enter a bank, could not get into the bank despite his trying to do so because the door was locked. In United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952), where the defendant was charged with attempted delivery of defense information to an associate, she had the documents in her purse while with the confederate at a meeting. In United States v. Green, 511 F.2d 1062 (7th Cir. 1975), the defendant, charged with attempted distribution of a controlled substance, was found to have written prescriptions for drugs which were not filled.

Thus, without ignoring the principle that the conduct need not nearly complete the crime, the substantiality of the conduct, for purposes of determining an attempt, must be measured by whether the defendant's conduct is his trying to begin the acts which are the verbs in the statute.

In this case, where the crime charged was attempted bank robbery,* there must have been some act by the appellants that would inexorably lead to their entry into and removal of money

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*18 U.S.C. §2113(a) also proscribes attempted entry into a bank with the intent to commit a crime. The indictment here did not charge this.

from the bank. However, when they had the intent to rob, they were not yet ready to enter, because they were determining whether conditions were appropriate; when they entered, they had no intent to rob because they were merely examining the bank.

B. June 21, 1976

The circumstances relating to the June 21 conduct requires the same result. One of the appellants here first walked up and down outside the bank and re-entered the car. The three of them drove around the community in which the bank was located, parking for varied periods of time, and one covered the license plate of the car. When they were arrested, they were driving at a distance from the bank without ever having entered it. This conduct does not confirm the firmness of criminal intent. It appears that the appellants were not sure what they were going to do. Indeed, Hodges' testimony was that they told her they would not go through with the crime because the FBI might be aware of its possibly happening. In this case, even the evidence of flight is not indicative of a consciousness of guilt as to the bank robbery, for the appellants may well have been concerned because they had guns in the car. Any other interpretation would render a person guilty of attempted armed robbery if he buys a gun in San Diego with the intent to use that gun in a robbery in New York. The result would be to denominate all preparatory conduct as "attempt," something

the courts disavow as a desirable result.

CONCLUSION

For the foregoing reasons, the judgment of the district court as to Counts Two and Three should be vacated and the counts dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Jan 24, 1977

I certify that corrected copies of this brief have been served on the following:

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